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Wyatt, Daniel

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# Is the Commission a "lawmaker"? On the right of initiative, institutional transparency and public participation in decision-making: *ClientEarth*

Case C-57/16 P, *ClientEarth* v. *Commission*, Judgment of the Court (Grand Chamber) of 4 September 2018 EU:C:2018:660

## 1. Introduction

The Commission occupies a unique place within the EU's legislative machinery. According to Treaties, it is the holder of an effective monopoly over legislative initiatives – a right of initiative, as it has been called – placing it in a powerful position as the initial framer of almost all pieces of EU legislation.[1] The Treaties also, however, unambiguously provide that according to the ordinary legislative procedure, the holders of the legislative function to whom the Commission addresses its proposals are jointly the Council and the European Parliament (EP),[2] leaving the Commission in a sort of "legislative limbo" where its precise role in EU lawmaking is somewhat ambiguous.[3] Although a seemingly minor or semantic issue on the face of it, the question of the Commission's taxonomic place within the legislative process actually has very real practical ramifications from the point of view of institutional transparency.

1. See Art. 17(2) TEU. This monopoly is, however, subject to a number of exceptions. For example, in the area of Justice and Home Affairs, the Commission shares the ability to initiate legislation with a quarter of the Member States (Art. 76 TFEU). And, although a softer "legislative" right, the EP and the Council both possess the ability to request that the Commission submit a legislative proposal on a matter on which they consider the EU should legislate, with the Commission required to provide reasons if it chooses not to submit a proposal (Arts. 225 and 241 TFEU respectively). More examples could be outlined.
2. See Arts. 14(1) and 16(1) TEU.
3. Other ambiguities or areas of confusion regarding the Commission's position during the legislative process can also be identified. A notable example being the question of whether the Commission has a right to withdraw a legislative proposal as a natural corollary to its right of legislative initiative. On this point, the ECJ relatively recently confirmed that the Commission does have such a power, although its exercise is nevertheless subject to some limits. See Case C-409/13, *Council* v. *Commission*, EU:C:2015:217. For an interesting piece on the Commission's right to withdraw legislative proposals, see Lupo, "The Commission's power to withdraw legislative proposals and its 'parliamentarisation', between technical and legal grounds", 14 EuConst (2018), 311–331.

According to the Public Access to EU Documents Regulation 1049/2001, the documents held by the EU institutions are subject to the principle of "widest possible access", subject only to certain specific and strictly interpreted exceptions to disclosure.[4] On top of this, Regulation 1049/2001 also provides that even wider access should be granted to "legislative documents" and that these documents should, subject to the discrete enumerated exceptions to disclosure, be made directly accessible by the institutions.[5] The nature of the Commission's "lawmaking" and of the documents it produces, therefore, has a potentially significant impact upon its obligations regarding the level of openness required with respect to its right of initiative activities.

The European Court of Justice in *ClientEarth* was required to grapple with these issues in the context of requests for Commission impact assessments ("IA") relating to future environmental legislative proposals and, in the process, provided an essentially ground-breaking decision. For the first time, the Court enunciated in some detail the Commission's role within the EU lawmaking process and, perhaps more importantly, held that the documents it produces as part of its right of initiative activities are legislative in nature and therefore should be particularly transparent and cannot be subject to a presumption of secrecy. The judgment can also be seen to provide a certain momentum with respect to the institutions' obligation to be more transparent with documents containing environmental information.

## 2. Factual and legal background

The applicant, ClientEarth – an environmental law NGO – submitted to the Commission a request for documents pursuant to Regulation 1049/2001. ClientEarth was seeking access to two separate IAs for legislative projects carried out by the Commission: the first concerning access to justice issues in environmental matters at Member State level pursuant to the Aarhus Convention and the second a proposal for a framework for inspections and surveillance for EU environmental legislation. Two initial points regarding these documents must be noted.

First, IAs are important documents in the context of the Commission's right of initiative activities which are produced for legislative initiatives that are expected to have "significant economic, social or environmental impacts".[6]

4. Art. 1(a) and recitals 4 and 11 of Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents, O.J. 2001, L 145/43.

5. Ibid., Art. 12(2) and recital 6.

6. Interinstitutional Agreement on Better Law-Making, O.J. 2016, L 123/1, para 13.

They assist the Commission in developing policy, and ultimately a legislative proposal, through determining the existence of a problem and whether EU action is needed, as well as the advantages and disadvantages of particular approaches to solving the problem.[7] As part of the IA drafting process, the Commission organizes a public consultation procedure of usually twelve weeks. However, the Commission is only required to follow minimum standards according to its own internal guidelines and has significant discretion as to what constitutes public consultation in any given IA process.[8]

Secondly, the Aarhus Convention is an international agreement, to which the EU is a party, regarding public participation and access to information and justice in decision-making in environmental matters.[9] The Convention seeks to improve environmental governance by granting to the public a number of rights with respect to the environment and related issues. It was subsequently operationalized in the EU context through Regulation 1367/2006.[10] For the purposes of the case at hand, Article 6(1) of this Regulation provides *inter alia* that the exceptions to disclosure in Regulation 1049/2001 are to be "interpreted in a restrictive way" in situations where the documents contain environmental information pursuant to its definition of the concept: both of the requested documents fell within these provisions.

Returning to the facts of the case, the Commission rejected the applicant's requests for the documents (as well as two associated opinions of the Impact Assessment Board that had been identified). According to the Commission, the requested documents were protected by the exception to disclosure contained in the first subparagraph of Article 4(3) of Regulation 1049/2001, which provides that "[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure".

7. Ibid., para 12.

8. Commission, "Guidelines on Stakeholder Consultation", < ec.europa.eu/info/sites/info/files/better-regulation-guidelines-stakeholder-consultation.pdf> (all websites last visited 25 Feb. 2018). For a useful comparative discussion of the transparency of the EU IA procedure I the US system, see Dudley and Wegrich, "The role of transparency in regulatory governance: Comparing US and EU regulatory systems", 19 *Journal of Risk Research* (2016), 1141–1157.

9. United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 1998).

10. Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental matters to Community institutions and bodies, O.J. 2006, L 264/13.

The applicant lodged two confirmatory applications to the Commission, claiming that the Article 4(3) exception to disclosure had been misapplied and that the Commission should therefore disclose the relevant documents. The Commission informed the applicant of its decision to confirm its refusal to disclose the documents. According to the Commission, the IAs were carried out to assist the Commission with preparing legislative initiatives in the relevant areas, and the assessments help in formulating the ultimate policy choices that would appear in any legislative proposals.[11] Following on from this, the release of the assessments before any concrete decisions had been made would seriously undermine its decision-making processes, because "such disclosure would restrict its room for manoeuvre and reduce its ability to reach a compromise".[12] And, further, disclosure of the documents "might create external pressures which could hinder those delicate decision-making processes, during which an atmosphere of trust ought to prevail".[13] ClientEarth subsequently brought two separate actions – that were ultimately joined – in the General Court, seeking to have the Commission's decisions refusing disclosure annulled.

## 3. Judgment of the General Court

In its judgment of 13 November 2015, the GC agreed with the arguments presented by the Commission, finding that the Article 4(3) exception to disclosure had been correctly applied to the relevant documents. Favouring the Commission's line of defence, the GC held that documents "drawn up in the context of preparing an impact assessment" are covered by a general presumption of confidentiality.[14] The doctrine of presumptions of confidentiality is a judicially-created mechanism with no basis in Regulation 1049/2001; it allows the institutions to refuse to disclose documents that fall within certain discrete categories – for example, in this case, "Commission impact assessments" – without the need to examine them individually, which is the standard procedure.[15]

By finding a presumption of confidentiality, the GC essentially held that release of Commission IAs will, invariably, seriously undermine the

11. Joined Cases T-424 & T-425/14, *ClientEarth* v. *European Commission*, EU:T:2015: 848, para 9 (GC Judgment).

12. Ibid., para 10.

13. Ibid.

14. Ibid., para 113.

15. Presumptions of secrecy were recognized as a possibility in Joined Cases C-39 & C-52/05 P, *Sweden and Turco* v. *Council*, EU:C:2008:374 and established formally in Case C-139/07 P, *Technische Glaswerke Ilmenau*, EU:C:2010:376.

Commission's decision-making processes protected pursuant to Article 4(3) of Regulation 1049/2001.[16] In support of this conclusion, the Court, following the Commission's lead, drew attention to the nature of the lawmaking powers conferred upon the Commission by Article 17(1) to 17(3) TEU, noting that pursuant to these provisions, the institution must be able to exercise its right of initiative "wholly independently", "in the general interest and free from any external pressure".[17] Releasing the requested documents prior to a decision being made would engender a risk that "third parties will attempt, outside of the public consultation organized by the Commission, to exercise targeted influence on the Commission's choice of policy option and the content of the policy proposal which that institution is led to adopt".[18]

The GC did accept that in principle, pursuant to Regulation 1049/2001 and the relevant ECJ case law, documents produced in the legislative process should be more widely accessible than non-legislative documents.[19] However, the GC was not of the opinion that IAs are legislative documents, stating that "when preparing and developing a proposal for an act, even a legislative act, the Commission does not itself act in a legislative capacity".[20] In the GC's opinion, the Council and the Parliament are, pursuant to the Treaties, the only legislative bodies of the EU.[21]

On appeal to the ECJ, the applicant – supported in intervention by Finland and Sweden – found substantially more success.

## 4. The Advocate General's Opinion

Advocate General Bot dealt first with the question of whether or not the relevant documents were "legislative" in nature pursuant to Regulation 1049/2001,[22] and stated that while the Commission cannot be described as possessing a "'legislative' capacity", it is nevertheless a "key legislative actor without whose impetus the EU's legislative activity would be non-existent".[23] Further, the Advocate General noted that with respect to the provisions of Regulation 1049/2001 that provide for wider and direct access of legislative documents, the relevant factor is the nature of the documents and not the

16. Joined Cases T-424 & T-425/14, *ClientEarth*, para 97.
17. Ibid., para 94.
18. Ibid., para 96.
19. Ibid., para 101.
20. Ibid., para 103.
21. Ibid., paras. 102–103.
22. Opinion of A.G. Bot of 28 Nov. 2017 in Case C-57/16 P, *ClientEarth* v. *Commission*, EU:C:2017:909.
23. Ibid., para 63.

nature of the institution that produced the document.[24] From this point of view, the documents that the Commission "prepares and develops in the context of the legislative process are precisely the basis for the legislative actions which citizens are entitled to acquaint themselves with".[25] For these reasons, the Advocate General was of the opinion that the relevant IAs and reports are clearly documents of a legislative nature and, therefore, a general presumption of confidentiality cannot be applied to them.[26] Presumptions of confidentiality, according to the Advocate General, can only be applied to documents that concern administrative or judicial proceeding.[27] This conclusion was further justified by the fact that, according to settled case law, exceptions to disclosure under Regulation 1049/2001 must be interpreted restrictively, which includes the application of the presumptions.[28]

The Advocate General also argued that, contrary to the GC's ruling, Article 17(1) to 17(3) TEU cannot justify the argument that disclosure of documents such as those at issue in this case automatically seriously undermine the Commission's decision-making processes and therefore should be covered by a general presumption of secrecy. Rather, the Commission was required to show, according to settled ECJ case law, that there was a "real risk which is reasonably foreseeable and not purely hypothetical of the decision-making process being undermined".[29] The Advocate General suggested, therefore, that the appeal should be successful.

## 5. Judgment of the ECJ

Responding to the issue of whether the Commission was entitled to presume that release of the relevant documents would seriously undermine its decision-making processes, the ECJ chose to analyse the issue from the vantage points of, first, the context in which the documents were created and, secondly, their content.

With respect to the context of the documents, the Court essentially adopted the Advocate General's position. Reiterating that legislative documents should be subject to wider access, the Court provided that the "possibility for citizens to scrutinize and be made aware of all the information forming the basis of EU legislative action is a precondition for the effective exercise of

24. Ibid., para 64.
25. Ibid., para 67.
26. Ibid., paras. 68–69.
27. Ibid., paras. 70–77 and 85–92.
28. Ibid., para 74.
29. Ibid., para 106.

their democratic rights".[30] Building on this notion, the Court then went on to say that for citizens to be able to exercise those rights effectively, not only must they have access to the relevant documents but they must also have access to those documents "in good time, at a point that enables them to make their views known regarding those choices"[31] so that they may "scrutinize the information and . . . attempt to influence that process":[32] all these points work towards enhancing the "democratic nature of the European Union".[33] Continuing, the Court then provided that the Commission is a "key player in the legislative process",[34] and the IAs – although not produced by the Commission acting formally in a "legislative capacity"[35] – are still to be considered "information constituting important elements of the EU legislative process, forming part of the basis for the legislative action of the European Union".[36] For these reasons, the principles regarding the increased transparency of legislative documents are applicable to the IAs; the conclusion was that "access should therefore . . . be granted in respect" of them.[37]

Moving to content, the ECJ approached the situation from an angle that was unexplored in the prior proceedings, and noted that the documents contain environmental information that falls within the provisions of Regulation 1367/2006. According to the Court, the terms of Regulation 1367/2006 provide for the "widest possible systematic availability and dissemination of environmental information" in essence to "promote more effective public participation in the decision-making process".[38] Importantly, pursuant to its Article 6(1), the exception to disclosure being applied to these documents must be interpreted restrictively.

Therefore, because the documents were legislative documents within the meaning of Regulation 1049/2001 (context) and contained environmental information according to Regulation 1367/2006 (content), the Court held that the exception to disclosure under Article 4(3) must be interpreted and applied particularly strictly in this case.[39]

On the basis of the conclusions drawn from its context and content analysis, the ECJ then dealt with the issue of the general presumption of confidentiality

30. Judgment, para 84.
31. Ibid.
32. Ibid., para 92.
33. Ibid.
34. Ibid., para 88.
35. Ibid., para 86.
36. Ibid., para 91.
37. Ibid., para 95.
38. Ibid., para 98.
39. Ibid., para 101.

established by the GC; it upheld the applicant's appeal and firmly rejected the GC's ruling at first instance and the Commission's arguments. As a preliminary matter, the ECJ noted, with respect to the previously upheld presumptions, that the documents at issue in those cases "were clearly defined by the fact that they all belonged to a file relating to ongoing administrative or judicial proceedings".[40] In enunciating this statement, the ECJ expressly referred to two prior cases in which it seemed to quite clearly imply that any new presumptions of confidentiality are to be restricted to those specific categories of documents.[41]

The Court then went on to state that, contrary to the Commission's arguments on the issue, it is, in fact, lack of information provided to the public during institutional decision-making processes that gives "rise to doubts as to whether that institution has fulfilled its tasks in a fully independent manner and exclusively in the general interest".[42] Continuing, the Court again emphasized that the Article 4(3) exception – including the application of any presumption of confidentiality pursuant to it – must be interpreted strictly here for the reasons outlined above.[43] Further, the Court also noted that the Commission is not obliged to respond, on the merits, to each individual comment made with respect to its as yet completed decision-making process.[44]

Crucially, the Court then held that, "although the Commission must be able to enjoy a space for deliberation" during its decision-making process, the GC was incorrect to hold that "documents drawn up in the context of an IA may, generally, remain confidential until that institution has made such a decision".[45] The Commission's Treaty-defined position does not therefore, and contrary to the conclusion reached by the GC, grant it any special powers of secrecy; rather, its important place within the legislative system requires it to be more transparent. The application of Article 4(3) of Regulation 1049/2001 therefore requires the Commission to examine each document individually to determine whether its release would "seriously undermine" the Commission's decision-making processes.[46] The Court ultimately held – after dispensing with the question of the general presumption of confidentiality – that the Commission had failed to

40. Ibid., para 81.
41. Case C-612/13 P, *ClientEarth* v. *Commission*, EU:C:2015:486, paras. 77–82; Case C-562/14 P, *Sweden* v. *Commission*, EU:C:2017:356, para 44.
42. Judgment, para 104.
43. Ibid., para 105.
44. Ibid., para 107.
45. Ibid., para 109.
46. Ibid., para 111.

substantiate that such a risk exists with respect to the specific documents at issue in this case.[47]

## 6. Comments

### 6.1. *Democracy, lawmaking, the citizen and transparency*

*ClientEarth* is a ground-breaking decision of the ECJ with respect to the Commission's role within the EU's legislative system, the nature of the documents it produces in the discharge of its legislative duties specifically, as well as institutional transparency more generally. By rejecting the essentially semantic arguments of the Commission, the ECJ reached, it is argued, the most logical conclusion possible with respect to the issue of the disclosure of IAs. Allowing the Commission – the holder of the right of initiative and therefore key legislative actor – greater secrecy in its preparatory legislative role due to its position in the Treaties, as the GC in fact did, would have set an unfortunate precedent from a democratic perspective. In addition to this, the decision of the ECJ highlights the fundamental importance afforded to transparency, a concept that has now been essentially constitutionalized,[48] in the Post-Lisbon EU.

Information is the currency needed for participation in decision-making – a democratic ideal enunciated in the EU context in Articles 10(3) and 11 TEU and Article 15(1) TFEU – and for being able to hold decision-makers to account for their actions. In the absence of relevant information being available during a decision-making process, confidence and legitimacy evaporate, essentially undermining those secret decision-making processes.[49] This point is made in Regulation 1049/2001,[50] reiterated consistently in relevant ECJ case law, including *ClientEarth*, and manifested in real world events, such as the protests against the (at least initially) famously opaque Transatlantic Trade and Investment Partnership negotiations.[51]

47. Ibid., paras. 115–128.

48. See Curtin and Hillebrandt, "Transparency in the EU: Constitutional overtones, institutional dynamics, and the escape hatch of secrecy", in Lazowski and Blockmans (Eds.), *Research Handbook on EU Institutional Law* (Edward Elgar, 2016).

49. Abazi and Hillebrandt, "The legal limits to confidential negotiations: Recent case law developments in Council transparency: *Access Info Europe and In 't Veld*", 52 CML Rev. (2015), 825–845, at 844.

50. Recital 2.

51. See e.g. Organ, "EU citizenship participation, openness and the European Citizens Initiative: The TTIP legacy", 54 CML Rev. (2017), 1713–1748.

The case further emphasizes that it is not only the mere release of information that is important in a democracy, but also the timing of that release. As the Court noted, disclosing the IAs only after a legislative proposal has been published would not be sufficient. Citizens must be afforded the ability to see into legislative processes that are still ongoing so that they have the opportunity to attempt to influence those processes. Disclosing information only after a decision has been made, basically takes the possibility for participation out of the hands of the public. Of course, it must be recognized, as argued by the Commission in the case, that ClientEarth did in fact have the opportunity to provide its opinions as part of the public consultations held during the IA procedures.[52] However, according to the ECJ, although these consultations are intended as a safeguard to ensure the Commission's procedural openness, the possibility of taking part in them is not sufficient, and cannot be understood to replace Regulation 1049/2001.[53] This is particularly so given that, according to the Commission's own IA guidelines, not every consultation is open to the public at large.[54]

Whether transparency actually leads to the theorized results is, of course, another question altogether. Multiple studies have revealed that the empirical and theoretical connections between, for example, transparency and accountability,[55] legitimacy,[56] and even the quality of decision-making[57] are by no means straightforward and may, in fact, often be counterintuitive, with increased transparency potentially leading to undesirable results. For example, Cross convincingly demonstrates that the steadily increased transparency of the Council in the legislative context is positively correlated with political grandstanding and point-scoring, which leads to more extreme initial position-taking and accordingly polarized negotiations.[58] O'Neill argues that increased transparency will, contrary to orthodox thinking about

52. Judgment, para 94.

53. Ibid.

54. Ibid.

55. See e.g. Lindstedt and Naurin, "Transparency is not enough: Making transparency effective in reducing corruption", 31 *International Political Science Review* (2010), 301–322.

56. See e.g. Curtin and Meijer, "Does transparency strengthen legitimacy?", 11 *Information Polity: The International Journal of Government and Democracy in the Information Age* (2006), 109–122; de Fine Licht, "Do we really want to know? The potentially negative effect of transparency in decision making on perceived legitimacy", 34 *Scandinavian Political Studies* (2011), 183–201.

57. See e.g. Stasavage, "Polarization and publicity: Rethinking the benefits of deliberative democracy", 69 *The Journal of Politics* (2007), 59–72.

58. Cross, "Striking a pose: Transparency and position taking in the Council of the European Union", 52 *European Journal of Political Research* (2013), 291–315. Interestingly, this empirical finding is precisely the opposite of what Habermas predicted would be the case according to his notion of deliberative democracy. See Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996).

openness, invariably erode trust in governance institutions.[59] However, given the legal nature of the concept of transparency within the EU, these criticisms are ultimately irrelevant. What is clear, based on the legal sources, is that the EU institutions should aim to promote and further their own transparency in accordance with Regulation 1049/2001's principle of widest possible access, and in good faith, restricted only by the very specific exceptions to disclosure contained within the Regulation, which are to be interpreted strictly.

With these points in mind, the question of how the institutions internally view their own transparency becomes important. As they are the day-to-day arbiters of Regulation 1049/2001 – i.e. it is the institutions who decide whether or not a document is released following an access request as well as decide on the subsequent appeals in the event of initial refusal – the way in which the institutions view the merits or otherwise of transparency is crucial because this opinion will inevitably bleed into the way in which they interpret the Regulation 1049/2001 exceptions to disclosure in individual cases. Since most document request rejections will not be appealed to the ECJ, it is therefore largely the institutions themselves who, within the generous confines of ECJ case law and the relatively open and malleable terms of Regulation 1049/2001, shape the contours of their own transparency.

Outwardly, the EU institutions appear committed to pursuing the type of openness outlined above – at least, based on their political rhetoric. For example, First Vice-President of the Commission Frans Timmermans recently stated that, "[t]he EU institutions need to work together to win back the trust of our citizens. We must be more open in everything we do."[60] Similar, and often more expansive, statements can be seen from the other institutions, particularly the EP.

However, a reading of *ClientEarth* leads to a rather sombre point of view regarding how the institutions internally view transparency (for those in favour of increased transparency in the EU). The Commission essentially argued for a "space to think" on the basis that revealing the IAs before a legislative proposal had been released would "seriously undermine" their decision-making processes. To the Commission, transparency at that stage leads invariably to unnecessary external pressures, which is something that must be avoided during "delicate decision-making processes" where room for manoeuvre must be maintained. The list of cases in which the institutions have

59. O'Neill, *A Question of Trust: The BBC Reith Lectures 2002* (Cambridge University Press, 2002). On the topic of transparency and trust, see also e.g. Bovens and Wille, "Deciphering the Dutch drop: Ten explanations for decreasing political trust in the Netherlands", 74 *International Review of Administrative Sciences* (2008), 283–305.

60. Commission, "Delivering on transparency: Commission proposes mandatory transparency register for all EU institutions", *Press Release*, 28 Sept. 2016, available at <europa.eu/rapid/press-release_IP-16-3182_en.htm>.

utilized similar strands of protectionist reasoning could be expanded significantly.[61]

These cases suggest that the institutions are, at best, sceptical of the arguments in favour of increased transparency. In fact, they paint themselves as easily disrupted in the event of potential public scrutiny of their ongoing decision-making, as well as somewhat wary of the citizens over whom they govern. These institutional fears are particularly interesting because, as noted by the ECJ in *ClientEarth*, the Commission was not even required to deal with every comment or criticism on the merits: a point that can also be made with respect to many other cases involving similar transparency-sceptical argumentation. The Commission seemed, therefore, to be attempting to avoid the mere inconvenience of publicity in order to make its job easier. The obvious issue with viewing the situation in this way, however, is that democratic legislating is not meant to be easy. In this regard, Advocate General Cruz Villalón expressed the matter elegantly when he opined that, "[i]nconvenient though transparency may be, when carrying out legislative as well as non-legislative functions, it must be said that it has never been claimed that democracy made legislation 'easier'".[62]

It is to be hoped that all the institutions, not just the Commission, take the *ClientEarth* judgment seriously with respect to the Court's insistence on the importance of transparency as a necessary aspect of a legitimate and well-functioning EU democracy. This is particularly so because it is likely that in trying to maintain and further their opaqueness, the institutions are merely attempting to evade ghosts for no obvious gain. As the Council said recently in a report on legislative transparency: "the disclosure of documents relating to ongoing legislative files that contain individual delegations' positions following a request for public access, does not seem to have had any disruptive effects on the decision making process".[63] The institutions may ultimately be fighting a battle for secrecy that provides them no real benefits, but only works to erode citizen confidence and ultimately destabilize their legitimacy and that of their decisions.

### 6.2. *Presumptions of confidentiality*

The *ClientEarth* proceedings also highlight the continued push by the institutions to bring increasingly more categories of documents within the

61. See e.g. Joined Cases C-39 & C-52/05 P, *Turco*; Case C-280/11 P, *Council* v. *Access Info Europe*; EU:C:2013:671; Case T-540/15, *De Capitani* v. *Parliament*, EU:T:2018:167.

62. Opinion of A.G. Cruz Villalón in Case C-280/11 P, *Council* v. *Access Info Europe*, EU:C:2013:325, para 67.

63. Council, "Legislative Transparency", *Draft Policy Paper*, 13 July 2018, at 5, available at <data.consilium.europa.eu/doc/document/ST-11099-2018-INIT/en/pdf>.

doctrine of presumptions of confidentiality. Although the ECJ ultimately held that the presumptions cannot apply to IAs – and indeed also, through the structure of its argumentation implied that the presumptions likely cannot apply to legislative documents generally,[64] an idea explicitly held by Advocate General Bot in his Opinion[65] – the ease with which the GC accepted the Commission's arguments that such a presumption should apply to the documents is concerning. This is because the presumptions have no legal basis in Regulation 1049/2001 and, further, recourse to them in any instance is distinctly at odds with the general "presumption of openness" that underpins the Regulation.[66]

According to the standard access to documents legal tests developed by the ECJ in accordance with Regulation 1049/2001, the institutions are, when determining whether an exception to disclosure applies, required to engage in a "specific and individual examination"[67] of each identified document, where they explain how disclosing that document "could specifically and effectively undermine" the protected interest.[68] In addition, the institution must show that the risk of that interest actually being undermined must be "reasonably foreseeable and not purely hypothetical"[69]; the mere fact that a document falls within the subject matter of an exception to disclosure is not sufficient for an institution to apply that exception.[70] Finally, the exceptions to disclosure must be interpreted strictly. The threshold for applying an exception to disclosure should, therefore, be quite high; the presumptions of confidentiality, however, reverse this situation.

For an applicant seeking access to a document covered by a presumption, the onus is upon them to prove either that the document is not covered by the presumption or that there is a "higher public interest" justifying disclosure.[71] No applicant has yet managed to reverse a presumption of confidentiality on these grounds, presumably because to do so seems to require the applicant to have specific knowledge of the document to which they are requesting access, essentially defeating the very purpose of their access to documents request. The presumptions may, therefore, in practice be impossible to rebut,[72]

64. Judgment, paras. 80–81 and 84–114.
65. A.G. Opinion, paras. 70–77 and 85–92.
66. Curtin and Leino, "In search of transparency for EU law-making: Trilogues on the cusp of dawn", 54 CML Rev. (2017), 1673–1712, at 1707.
67. Judgment, para 81.
68. Joined Cases C-39 & C-52/05 P, *Turco*, para 49.
69. Case C-506/08 P, *Sweden* v. *MyTravel and Commission*, EU:C:2011:496, para 76.
70. Case T-710/14, *Herbert Smith Freehills* v. *Council*, EU:T:2016:494, para 32.
71. Case C-139/07 P, *Technische Glaswerke Ilmenau*, para 62.
72. Curtin and Leino, op. cit. *supra* note 66, at 1707.

meaning that their existence sits very uncomfortably within Regulation 1049/2001's openness regime.

The presumptions are also problematic because they appear to rest in part on a questionable reading of Regulation 1049/2001 as regards the legal difference in openness between legislative and non-legislative documents. As noted above, Regulation 1049/2001 provides for the widest possible access for all institutional documents and, on top of this, even wider and direct access for legislative documents. The issue stemming from this, however, is that the ECJ appears to understand the emphasis on wider access to legislative documents as a reason to more narrowly interpret the right of access to non-legislative documents, in essence justifying the existence of the presumptions of confidentiality.[73] This conclusion is, however, unpersuasive.

The emphasis upon the transparency of legislative documents does not automatically lead to the conclusion that the principle is not equally important with respect to non-legislative documents.[74] As noted earlier by Advocate General Sharpston regarding the arguments underpinning the concept of transparency in the EU, "the considerations that apply to legislative acts are equally relevant to executive activities".[75] Public access to documents laws were intended, after all, to open up public administrations, with legislative decision-making processes usually remaining outside their ambit.[76] Placing non-legislative documents on a tier of openness significantly lower than legislative documents is, therefore, difficult to justify, as indeed is the converse.

It is argued here that the focus in cases of institutional application of an exception to disclosure under Regulation 1049/2001 should almost exclusively be upon the application of that exception and not on the legislative/non-legislative nature of the document. In other words, the salient issue should be whether the institution can prove that release of a document will "specifically and effectively undermine" – or, in the case of Article 4(3) of Regulation 1049/2001, "seriously undermine" – the protected interest and that the risk of that undermining is "reasonably foreseeable and not purely hypothetical". This is particularly the case because, once again as noted by Advocate General Sharpston, the exceptions to disclosure do not themselves stipulate that the legislative or non-legislative nature of the document should be determinative. Rather, the principle of wider access to legislative

73. Case C-139/07 P, *Technische Glaswerke Ilmenau*, para 60; Joined Cases C-514, 528 & 532/07 P, *Sweden* v. *API and Commission*, EU:C:2010:541, para 77; Case T-403/15, *MyTravel* v. *Commission*, EU:C:2011:496, para 87.

74. Curtin, "Judging EU secrecy", (2012) CDE, 459–490, at 481.

75. Opinion of A.G. Sharpston in Case C-350/12 P, *Council* v. *Sophie in 't Veld*, EU:C:2014:88, para 73.

76. Curtin, op. cit. *supra* note 74, at 481.

documents is contained in a mere recital of Regulation 1049/2001, with the ECJ having previously held that recitals do not generate binding effect.[77] For all intents and purposes, therefore, when it comes to the application of the Regulation 1049/2001 exceptions to disclosure, the nature of the document should be essentially irrelevant.

Of course, it is also important here to recognize the undeniable practical utility of the doctrine: the categories of confidentiality are clearly valuable from the point of view of efficiency and certainty in the context of a largely discretionary access to documents regime where requests can potentially span thousands of documents. Nevertheless, a judicial mechanism that essentially creates "access-free zones" within the EU administration should be viewed with a healthy amount of scepticism, regardless of its merits, particularly considering that the ability to access EU documents is a fundamental right of the Union.[78]

To date the ECJ has accepted five presumptions of confidentiality with respect to non-legislative documents.[79] As noted by Curtin and Leino, these presumptions originated regarding broad requests for administrative documents that concerned private interests (for example, documents relating to a State aid investigation[80]) but have steadily expanded to encompass categories of documents where a clear public interest in their publicity could be argued for (for example, documents that relate to an EU Pilot Procedure[81]).[82] *ClientEarth* rules out these categories being extended to IAs – and perhaps likely also to legislative documents generally – and hopefully implies, therefore, that the steady "presumption creep" will be slowed, if not stopped entirely. Given that the existence of the presumptions stems in the first place from a questionable act of judicial activism, this delimiting is a positive sign.

### 6.3. *Regulation 1367/2006 and the strict interpretation of exceptions to disclosure*

Finally, *ClientEarth* sends a strong signal regarding the importance of the Aarhus regime with respect to EU institutional transparency. For most of its life, Regulation 1367/2006 served largely as a footnote in ECJ access to

77. Opinion of A.G. Sharpston in Case C-350/12 P, *Council* v. *Sophie in 't Veld*, para 72.

78. Curtin and Leino, "Openness, transparency and the right of access to documents in the EU", In-Depth Analysis for the PETI Committee (2016), pp. 11–12.

79. For a full list, see judgment, para 81.

80. Case C-139/07 P, *Technische Glaswerke Ilmenau*.

81. Case C-562/14 P, *Sweden* v. *Commission*.

82. Curtin and Leino, op. cit. *supra* note 78, p. 10. <www.europarl.europa.eu/RegData/etudes/IDAN/2016/556973/IPOL_IDA(2016)556973_EN.pdf>.

documents cases.[83] However, *ClientEarth*, on the back of other recent judgments that together imply a growing jurisprudential importance of Regulation 1367/2006,[84] makes it quite clear that the exceptions to disclosure should be interpreted particularly strictly with respect to documents that contain environmental information. It appears likely, then, that this judgment will give increased impetus to the ECJ to apply the provisions of Regulation 1367/2006 in full in EU access to environmental documents cases that come before it.

However, despite the potential practical and symbolic significance of the ruling with respect to the role of Regulation 1367/2006 within the Regulation 1049/2001 access to documents regime, the state of the case law with respect to the issue of the strict interpretation of exceptions to disclosure remains confusing. This is because the situation as it currently stands appears to be a three-layered strict interpretation hierarchy, for which it is difficult to discern any tangible differences in legal effect between each of the layers.

In other words, the first layer is that all of the exceptions to disclosure are as a rule subject to the principle of strict interpretation. Secondly, a potentially more strict interpretation is to be applied with respect to documents that are legislative or that contain environmental information. Finally, a particularly strict interpretation applies in cases involving institutional documents that are both legislative in nature and contain environmental information. Arguably, it is almost impossible to apply these vague standards with any consistency from case to case. Given the confusing state of the law in this regard, some clarification from the ECJ regarding the relationship between and impact of these strict interpretation obligations would be most welcome.

## 7. Concluding remarks

From the perspective of transparency in the EU, *ClientEarth* is a significant judgment. It identifies the Commission as fundamental player in the lawmaking framework of the EU and places the documents it produces as part of its right of initiative work firmly within Regulation 1049/2001's concept of legislative documents. Further, the ECJ also importantly held that a presumption of confidentiality cannot cover Commission IAs, and strongly implied that the doctrine will not be extended to legislative documents generally in the future. In addition, by relying substantively on the provisions

83. Hillebrandt and Leppävirta, "On the administration of pollution: How much 'Space to Think' may the EU claim?", 8 EJRR (2017), 791–797, at 795.

84. See e.g. Case C-673/13 P, *Commission* v. *Stichting Greenpeace Nederland and PAN Europe*, EU:C:2016:889; Case C-60/15 P, *Saint-Gobain* v. *Commission*, EU:C:2017:540.

of Regulation 1367/2006 in reaching its conclusion, the Court has likely made it easier for those seeking environmental information from the institutions from now on.

A number of points of confusion and controversy remain with respect to the ECJ's access to documents case law. Nevertheless, *ClientEarth* must still be viewed as a success. As the case reminds us, timely transparency – and particularly legislative transparency – is an essential aspect of a democratic and legitimate EU. Allowing the Commission to remain behind a veil of secrecy in its preparatory legislative activities would have been a clear step away from such ideals.

Daniel Wyatt*

* Doctoral Candidate, University of Helsinki (e-mail: daniel.wyatt@helsinki.fi). I wish to thank Päivi Leino-Sanberg as well as the anonymous reviewers for their valuable suggestions. Any mistakes remain solely my own.